

**Bio-Medical Applications of Puerto Rico, Inc. and
Union General de Trabajadores de Puerto Rico,
Petitioner. Case 24-RC-6621**

3 April 1984

**DECISION, ORDER, AND DIRECTION
OF SECOND ELECTION**

**BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS**

On 28 August 1981 the Regional Director for Region 24 of the National Labor Relations Board issued his Report and Recommendation on Objections in this proceeding.¹ The Employer filed exceptions, with a supporting brief, to the Regional Director's recommendation to overrule all six of the Employer's objections. On 16 February 1982 the Board issued its Decision and Order sustaining the Regional Director's recommendations with respect to Employer's Objections 1,2,3, and 5, and directed that a hearing be conducted on the alleged agency status of employees Manuel Muniz (M. Muniz) and Edwin Muniz (E. Muniz), and Employer's Objections 4 and 6. A hearing was held before a duly designated hearing officer and, on 2 July 1982, the hearing officer issued his Report and Recommendations on Objections, in which he found that M. Muniz and E. Muniz were not agents of the Petitioner and recommended that Employer's Objections 4 and 6 be overruled.

The National Labor Relations Board, by a three-member panel, has considered the pertinent objections and the hearing officer's report recommending disposition of same. The Board has reviewed the record in light of the Employer's exceptions and the brief filed in this proceeding and has decided to affirm the hearing officer's findings and recommendations only to the extent consistent herewith.²

1. With respect to the agency issue, the hearing officer found that M. Muniz and E. Muniz were not Petitioner agents and that their attempts to identify themselves with the Petitioner suggested that they were no more than ardent union supporters. We disagree.

We first note certain facts as background to our decision. The Employer operates health care facilities in Mayaguez, Ponce, and Hato Rey, Puerto Rico. In the spring of 1981,³ the Petitioner con-

ducted union organizational efforts at all three facilities. M. Muniz and E. Muniz, brothers and alleged agents of the Petitioner, campaigned actively for the Petitioner during this period as avowed members of the Petitioner's in-plant organizing committee. Although it is uncontroverted that the Muniz brothers' participation in the Petitioner's campaign was extensive, the nature of their participation and their status in relation to the Petitioner are disputed. In addition to its contention that M. Muniz and E. Muniz were apparent agents, the Employer also alleges that, because the in-plant organizing committee circulated a leaflet under the Petitioner's logo and letterhead without a Petitioner official's signature, the in-plant organizing committee was vested with authority by the Petitioner to act as the Petitioner's independent agent.

Employer witnesses alleged that the Muniz brothers' campaign activities reflected their apparent agency status, as follows: (1) The Muniz brothers visited the Employer's Mayaguez facility "on endeavors for the Union," even though they were employed at the Hato Rey facility; introduced themselves as representatives of the Petitioner; and requested permission to post union literature on the Employer's bulletin boards and to greet the employees there; (2) they introduced themselves as the Petitioner's representatives in the presence of the Petitioner's organizing secretary, Perfecto, and its president, Lebron, at several meetings held by the Petitioner in May and June for the employees at the Mayaguez facility; (3) M. Muniz spoke to a fellow employee about the Petitioner's initiation fees and dues, allegedly as a Petitioner representative; (4) the Muniz brothers accompanied Perfecto and Lebron to the representation proceedings held before the Board; (5) they asked Employer representatives questions on behalf of the employees at a meeting held by the Employer with its employees before the election; (6) M. Muniz attended the preelection conference, at which he introduced himself as a Petitioner representative, in Perfecto's presence; (7) M. Muniz attended the postelection ballot count with the Petitioner's officials; and (8) M. Muniz remained in the designated no-electioneering area, under Perfecto's instructions, for almost the entire polling period.⁴

Perfecto denied that the Muniz brothers had introduced themselves as Petitioner representatives on any of the aforementioned occasions, and denied that they were ever given authority to act

¹ The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 55 for and 43 against the Petitioner, with 3 challenged ballots, an insufficient number to affect the results.

² In the absence of exceptions, we adopt, pro forma, the recommended overruling of Employer's Objection 4.

³ All dates are in 1981 unless indicated otherwise.

⁴ Although the hearing officer did not indicate explicitly the duration of M. Muniz' presence in the waiting room, the uncontroverted record testimony indicated that M. Muniz remained in the waiting room "almost all of the time."

as the Petitioner's agents.⁵ Perfecto also denied that the in-plant organizing committee was vested with authority to act as the Petitioner's agent and claimed that the leaflet circulated by the in-plant organizing committee under the Petitioner's logo and letterhead, but without a Petitioner official's signature, was an "involuntary" mistake. According to Perfecto, the Muniz brothers' function was to keep the Petitioner informed of all endeavors undertaken on the Employer's premises, to refute misstatements concerning the Petitioner at Employer-sponsored meetings with employees, and to act as a liaison between the Petitioner and the employees.

Without making a complete credibility resolution between the Employer's witnesses' allegations and Perfecto's denials, the hearing officer concluded that, assuming *arguendo* that he credited the Employer's witnesses' allegations that the Muniz brothers introduced themselves repeatedly as Petitioner representatives, the evidence failed to support the Employer's contentions that the brothers were the Petitioner's agents or clothed with apparent authority.

Contrary to the hearing officer, we find that, even assuming the case in the best light possible for the Petitioner by crediting Perfecto's denials, there is ample remaining evidence that the Muniz brothers had apparent authority to conduct themselves as the Petitioner's agents. Perfecto's denials covered only a few of the Employer's allegations; the remaining uncontroverted Employer allegations are as follows: (1) The Muniz brothers campaigned for the Petitioner at the Mayaguez facility, and introduced themselves as representatives of the Petitioner there; (2) M. Muniz spoke to a fellow employee about the Petitioner's initiation fees and dues, allegedly as a Petitioner representative; (3) the Munizes asked questions on behalf of the employees at a meeting held by the Employer with its employees before the election; (4) the Muniz brothers accompanied Perfecto and Lebron to the representation proceedings held before the Board; (5) M. Muniz attended the preelection conference; (6) M. Muniz and E. Muniz traveled to the Mayaguez facility with Petitioner officials on election day, even though they were employed at the Employer's Hato Rey facility; (7) M. Muniz remained in the waiting room pursuant to Perfecto's instructions; and (8) M. Muniz attended the postelection ballot count with Petitioner officials.

We note that Section 2(13) of the Act provides that

⁵ Although both Muniz brothers allegedly were available at the hearing, neither one was called to testify.

[I]n determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Rather, responsibility attaches to the Petitioner if, applying the "ordinary law of agency," it is shown that the Muniz brothers were acting in the capacity of Petitioner agents.⁶ Thus, the determinative factor in establishing agency status is not authorization or ratification of the agent's acts by the principal, but rather the nature of the agency. A principal is responsible for its agents' conduct if such action is done in furtherance of the principal's interest and is within the general scope of authority attributed to the agent, even if the principal did not authorize the particular act. In other words, it is enough if the principal empowered the agent to represent the principal within the general area in which the agent has acted.⁷

In the instant case, we conclude that, despite the Petitioner's denials that it ever authorized the Muniz brothers to act as its agents, the foregoing uncontroverted allegations, when considered in toto, demonstrate amply that the Munizes' relations with Petitioner officials reasonably manifested that M. Muniz and E. Muniz were Petitioner representatives.⁸ Assuming *arguendo* that the Petitioner did not ratify the Munizes' activities, the Petitioner "held out" the Munizes as apparent agents by failing to disassociate itself from the results of the Munizes' actions; by permitting the Muniz brothers to speak on behalf of the Petitioner at meetings held by the Petitioner for the employees;⁹ by permitting the Munizes to make special appearances with Petitioner officials at official election functions; by transporting the Muniz brothers to another Employer facility to campaign and vote on the day of the election; and by instructing M. Muniz to remain in the no-electioneering area on election day. We therefore reverse the hearing officer's finding on this issue.

⁶ See *Teamsters Local 886 (Lee Way Motor Freight)*, 229 NLRB 832 (1977), *enfd.* 589 F.2d 1116 (D.C. Cir. 1978).

⁷ *Hampton Merchants Assn.*, 151 NLRB 1307, 1308 (1965); *Electrical Workers Local 914*, 106 NLRB 1372, 1379 (1953). See generally *Restatement 2d, Agency* § 12 comment a and § 49 comments b and c (1958).

⁸ See generally *Pastoor Bros. Co.*, 223 NLRB 451, 453 (1976); *Mine Workers District 50 (Terry Elkhorn Mining Co.)*, 163 NLRB 562, 563 at fn. 1 (1967); *Operative Potters Local 340 (Macomb Pottery Co.)*, 175 NLRB 756, 757 (1969).

⁹ The hearing officer did not address this testimony explicitly, but Perfecto conceded at the hearing that, although he had never authorized the Muniz brothers to speak on behalf of the Petitioner as Petitioner officers, M. Muniz and E. Muniz had in fact spoken on behalf of the Petitioner in his presence.

2. In view of our finding that the Muniz brothers were agents of the Petitioner, we also disagree with the hearing officer's finding concerning the alleged *Milchem*¹⁰ rule violation. Although M. Muniz was employed at the Employer's Hato Rey facility, he traveled to the Mayaguez facility with Perfecto on the day of the election to cast his vote. It is undisputed that Perfecto instructed M. Muniz to remain in the waiting room, an area which was adjacent to the conference room, where polling was conducted. Although the Board agent had designated the waiting room to be part of the no-electioneering area, Perfecto instructed M. Muniz to remain there pending his opportunity to vote, and to ensure that no supervisor occupied the area or held a conference there. Both rooms were enclosed and separated by a wall and door. Despite the Board agent's admonition that all representatives of the parties must remain outside the waiting room or polling area, M. Muniz remained in the waiting room for almost the entire election period.

M. Muniz spoke to four voters as they approached the polls, as follows: (1) When he was situated between the hall and the waiting room, he inquired of one employee why certain personnel at the medical center had not arrived yet; (2) he informed two employees in the waiting room that they could not be present there before voting, but rather that they had to remain in the working area; and (3) he asked an employee in the waiting room, "How are you fellow-worker?" Nothing more was said. Furthermore, a fifth employee witnessed Employer Administrator Angel Sierra's futile attempts to get M. Muniz to abandon the waiting room.

The hearing officer found that M. Muniz was in the no-electioneering area improperly, but he termed him an "unauthorized" Petitioner "observer." Noting his earlier finding that M. Muniz was not a Petitioner agent, and finding that M. Muniz' conversations were short, casual, and purportedly not concerned with how the employees voted, the hearing officer concluded that the *Milchem* rule was inapplicable to any "chance, isolated, innocuous comment or inquiry." Moreover, because the content of M. Muniz' conversations with voters in the waiting room did not constitute electioneering, the hearing officer concluded that there was no *Milchem* violation.

In *Milchem*, the Board enunciated its reasons for setting aside elections which involved conversations between party representatives and voters in the no-electioneering area. The Board noted that "the potential for distraction, last minute electioneering or pressure, and unfair advantage from pro-

longed conversations between representatives of any party to the election and voters waiting to cast ballots is of sufficient concern to warrant a strict rule against such conduct, without inquiry into the nature of the conversations. . . ."¹¹ Contrary to the implication in the hearing officer's report, the Board did not intend to limit the *Milchem* rule only to electioneering.¹² Rather, the Board announced therein a strict rule against conversations between party representatives and voters in the polling area without regard to the nature of the conversation. The Board stated in *Milchem* that¹³

[t]he difficulties of recapturing with any precision the nature of the remarks made in the charged atmosphere of a polling place are self-evident, and to require an examination into the substance and effect of the conversations seems unduly burdensome and, in this situation, unnecessary. . . . [A] blanket prohibition against such conversations is easily understood and simply applied.

. . . Additionally, by attaching a sanction to its breach, the rule assures that the parties will painstakingly avoid casual conversations which could otherwise develop into undesirable electioneering or coercion.

Unlike the hearing officer, we do not find that M. Muniz' comments to prospective voters in the waiting room fall within the "chance, isolated, innocuous comment or inquiry" exemption from the *Milchem* rule blanket prohibition. We note that the Board in *Milchem* stated that, in order to obviate the troublesome task of deciding what constitutes an innocuous comment, the parties to the election should instruct their agents "simply to refrain from conversing with prospective voters in the polling area."¹⁴ To the contrary, the Petitioner in the instant case admittedly instructed M. Muniz to remain in the waiting room pending his opportunity to vote. Because M. Muniz spoke with four voters in the no-electioneering area and because of his extended presence in the waiting room, we conclude that his conduct was persistent and deliberate and clearly amounted to more than a "chance, isolated, innocuous comment or inquiry." Furthermore, because M. Muniz informed two employees that they could not remain in the waiting room pending their turn to vote, his words and acts may well have conveyed to these voters the impression that he had some connection with, if not control over, the election.¹⁵

¹¹ Id.

¹² *Modern Hard Chrome Service Co.*, 187 NLRB 82 (1970).

¹³ *Milchem*, supra at 362-363.

¹⁴ *Milchem*, supra at 363.

¹⁵ See *Monroe Mfg. Co.*, 200 NLRB 62, 74 (1972).

¹⁰ *Milchem, Inc.*, 170 NLRB 362 (1968).

We also find no merit in the Petitioner's contentions that the *Milchem* proscription is inapplicable in the instant case because M. Muniz did not engage in "prolonged conversations," as required under the *Milchem* standard. We note that whether conversations are "prolonged" or "sustained" is determined by examining the cumulative effect of the party agent(s)' conduct.¹⁶ In the instant case, M. Muniz' presence in the waiting room was not momentary,¹⁷ but rather was sustained throughout the election. Furthermore, not only had the Board agent admonished that no party agent could be situated in the waiting room, but M. Muniz was informed by Angel Sierra, an Employer administrator, that his conduct was violative of the election rules. In disregard of these admonitions, M. Muniz persisted in his conduct.¹⁸ For all of the above reasons, we find that M. Muniz' conversations were "prolonged" within the *Milchem* standard. Finally,

we reject the hearing officer's conclusion that because Manuel's comments were "casual and unrelated to the manner in which the employees voted," they did not warrant setting aside the election. As noted earlier, *Milchem* obviates the need for an inquiry into the nature of the conversation; absent a "chance, isolated, innocuous" comment, once the conduct is found to have occurred within the proscribed area, the election must be set aside.¹⁹

On the basis of all of the above, we find that Petitioner did vest Manuel and Edwin Muniz with apparent authority to function as its agents, and that M. Muniz violated the *Milchem* rule by his actions in the waiting room during the election. Accordingly, we sustain Employer Objection 6, set aside the election, and direct that a second election be conducted.

ORDER

It is ordered that the election in this case conducted on 24 June 1981 is set aside.

[Direction of Second Election omitted from publication.]

¹⁶ See, e.g., *Princeton Refinery, Inc.*, 244 NLRB 1 (1979); *Pastoor Bros. Co.*, 223 NLRB 451, 453 (1976).

¹⁷ Cf. *El Rancho Market*, 235 NLRB 468, 482 (1978), *enfd.* 603 F.2d 223 (9th Cir. 1979) (employer's wife's presence at the election site for less than 2 minutes not objectionable); *Marathon Metallic Building Co.*, 224 NLRB 121 (1976) (supervisor's momentary presence in the voting area not objectionable).

¹⁸ Cf. *Modern Hard Chrome Service Co.*, 187 NLRB 82 (1970) (petitioner observer continued to converse "beyond a mere hello" notwithstanding the Board agent's admonition); *Star Expansion Industries*, 170 NLRB 364, 365 (1968).

¹⁹ See *Milchem*, *supra* at 362 (conduct of union secretary-treasurer, who engaged employees waiting in line to vote in conversation for several minutes, warranted a second election regardless of the content of the remarks exchanged).